SOUTHERN FINANCE CO. BHD.

v.

LEE GEOK LIN

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-31-2233-88]
22 JUNE 1990

LAND LAW: *Charge - Penalty interest - Prescribed rate of interest - Cause to the contrary - National Land Code 1965, s. 256.*

CIVIL PROCEDURE: *Affidavit - Procedure for correcting affidavit - Amendment of originating summons - Res judicata - Justification for the doctrine - Finality and conclusiveness - Protection from vexatious multiplication of suits - Estoppel - Same document and same reliefs - Cause of action estoppel - Issue estoppel.*

The defendant L, being the registered owner of the said lands, had charged for property to the plaintiff S as security for a loan. Due to default in payments by L, S sought an order for sale of the said lands by public auction under s. 256 of the National Land Code. L contended firstly that S had charged interest at 4% over and above the prescribed rate of interest (as varied) and secondly that this charge action was barred by the doctrine of *res judicata* as there was an earlier charge action between both parties on the same subject matter invoking the same issue of exercise penalty interest (the earlier action); this earlier action was dismissed when the Court held that the penalty interest charged by S was a cause to the contrary under s. 256(3) National Land Code. L alleges that in this case, it was just recalculating the loan sum and interest based on the prescribed rate of interest in Clauses 1 and 4 of the charge annexure.

Held:

[1] (a) The present action emanates from the same charge annexure and the reliefs prayed for are the same as the earlier action.

(b) It is important to note that as the plaintiff's cause of action in the present case rests on its relinquishment or abandoning of the penalty interest or default interest based on the rate of 19% per annum which is contrary to Clause 4 of the charge annexure (which was the same one as in the earlier action), the plaintiff should have at the hearing of its application made under the earlier action raised the issue that even if the plaintiff were found to be wrong in charging the default interest, is was prepared to abandon the charging of the default interest.

(c) Having failed to do so and instead, insisted on its right to impose the default interest at 19% it is precluded from raising the issue now.

[2] (a) There are three sets of inconsistent figures as to how much was owed by the defendant on 31 May 1988.

(b) It is not the case of the plaintiff's attempting to correct figures cited wrongly in the earlier affidavits, but it is an attempt to correct the figure cited in this originating summons. Needless to say that such correction cannot be done by affidavit - the plaintiff should amend its originating summons to bring in the correct amount owed by the defendant as at 31 May 1988.

[3] The plaintiffs did not produce a statement of account showing its recalculation of the default interest rate - it does not categorically show that the defendants were charged with the prescribed rate ranging from 13.5% to 15% in respect of the penalty interest; it merely shows that the general interest rate was within the prescribed interest rate.

[4] The Court is satisfied that the 'cause of action estoppel' operates as a complete bar against the present action of the plaintiff and that the issue estoppel which ensued from the same issues decided earlier by the Court in the earlier action also precludes the plaintiff from reagitating the issues which it is trying to bring up under the present originating summons.

[Plaintiff's action dismissed.]

Cases referred to:
Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] AC 853
Lockyer v. Ferryman [1877] 2 AC 519
Henderson v. Henderson [1843] 3 Here 100
Shoe Machinery Co. v. Cutlan [1896] 1 Ch 667
Hoystead v. Taxation Commission [1926] AC 155
Fidelitas Shipping Co. Ltd. v. V/O Exportchleb [1965] 2 All ER 4

Legislation referred to:
National Land Code 1965, ss. 256, (3)

Other source referred to:
Res Judicata by Spencer-Bower & Turner 2nd Edn., at p. 161

For the plaintiff - Ho Phuay Ling; M/s. Ng & Ong
For the defendant - Lim Kem Thuan; M/s. Gill & Tang

JUDGMENT

Lim Beng Choon J:

By this originating summons dated 6 August 1988 the plaintiff is asking *inter alia* for an order that the lands held under H.S.(D) Nos. 26628 and 26629 Lot Nos. 14868 and 14869 of which the defendant is the registered owner but charged to the plaintiff under a charge registered in Registry of Titles Negeri Sembilan *vide* Presentation No. 3241-83 Jilid 416 Folio 89 be sold public auction under the directions of this Court pursuant to s. 256 of the National Land Code to satisfy the balance of the principal sum of RM148,582.34 inclusive of interest as at 31 May 1988 and still continuing. In the affidavit in support of the application affirmed by one Choo Boo Choo, the manager of the plaintiff company, he averred that by a charge dated 7 April 1963 and registered at the Registry of Land Titles Negeri Sembilan, the defendant charged the said properties to the plaintiff as security for repayment of the principal sum of RM150,000 together with interest thereon. The defendant made default in the repayment as set out in the charge whereupon on 24 June 1988 the plaintiff through its solicitors served on the defendant the notice in Form 16D pursuant to s. 254 of the National Land Code in respect of the charge. The defendant failed and/or neglected to pay the aforesaid sum due and owing within the time specified in the said notice. A second affidavit was affirmed by the same Choo Boo Choo on 6 March 1989 in which he said that the loan sum of RM150,000 was fully disbursed on 8 April 1983. The defendant had since the disbursement of the term loan paid a total sum of RM111,367 towards payment of the principal loan and interest and as on the issue of the originating summons on 6 August 1988 the defendant was in default in the payment of the sum of RM64,575. However as at 4 April 1989 the defendant owed the plaintiff a total sum of RM178,496.78 with daily interest of RM109.59.

In opposing the application the defendant affirmed three affidavits on 30 March 1989, 11 April 1989 and June 1989 respectively. The grounds relied by the defendant as can be seen in her affidavits and as pointed out by Counsel for the defence are these:

(a) that the plaintiff had in contravention of the charge document charged penalty interest at 4% over and above the prescribed rate of interest or as varied from time to time - which constitutes a "cause to the contrary under s. 256(3) of the National Land Code 1965;

(b) that this charge action of the plaintiff barred by the doctrine of *res judicata* as there was an earlier charge action between the same parties in respect of the same subject matter involving the same identical issue of excessive penalty interest *vide* Kuala Lumpur High Court Originating Summons No. 31-2546-87 which had been adjudicated by the Court after full hearing and that charge action was dismissed by the Court after having satisfied that the penalty interest charged by the plaintiff constituted a cause to the contrary under s. 256(3) of the National Land Code 1965.

In response to the averments contained in the affidavits of the defendant, the manager of the plaintiff company affirmed a further six affidavits to show that the plaintiff had re-calculated the loan sum and interest based on the prescribed rate of interest as provided in Clause 1 and Clause 4 of the charge annexure. I do not propose to set out the contents of all the six affidavits. It is sufficient for purpose of this judgment to refer to the contents of two of the affidavits. The first one is the corrective affidavit affirmed by Choo Boo Choo on 5 July 1989 in which he averred in para. 1 of his corrective affidavit that the total amount of loan outstanding as at 31 May 1988 was RM144,292.33 and not RM149,582.34 as stated in para. (a) of the originating summons. He further averred that:

(a) as on the issue of the originating summons on 6 August 1988, the defendant was in default of the sum of RM66,751.04 and not RM64,575 as stated in para. 4 of his affidavit in support dated 6 March 1989 and

(b) as on 4 April 1989 the total amount outstanding was RM170,984.31 with daily interest of RM102.57 (subject to change) from 5 April 1989 till date of full settlement and not RM178,496.78 with daily interest of RM108.59 as stated in para. 5 of his said affidavit.

It was also stated that the several sums outstanding did not carry the penalty interest rate of 4% above the prescribed rate. The second affidavit is the further corrective affidavit affirmed by Loh Teng Fong the current manager of the plaintiff company on 6 December 1989 in which he averred that:

(a) as on 31 May 1988 the total amount of loan outstanding was RM145,375.50 and not RM144,292.33 as stated in para. 1 of the corrective affidavit of Choo Boo Choo; and

(b) as on 4 April 1989 the total amount of loan outstanding was RM175,461.13 with daily interest of RM104.13 (subject to change) from 5 April 1989 till date of full settlement and not RM170,984.31 with interest of RM102.57 as stated in para. 2(b) of the said corrective affidavit.

He also produced a statement of account (annexed as Exhibit 'F' to his further corrective affidavit) to show that the plaintiff had re-calculated the loan sum and interest as from 8 April 1983 to 11 December 1989 based on the prescribed interest rate ranging from 13.5% to 15%.

The first question for consideration is whether by reason of the decision of this Court in Originating Summons No. 31-2546-87, the present action of the plaintiff now before this Court is estopped by *res judicata* (ground (b) relied by the defendant). I can deal briefly with the events leading up to that decision as I had taken the liberty to refer to the Court file relating to the earlier originating summons. In that originating summons filed on 31 July 1987 the plaintiff prayed for an order for the sale of the same properties by public auction pursuant to s. 256 of the National Land Code to satisfy the balance of the principal sum of RM126,242.72 inclusive of interest as at 28 May 1987 and still continuing. The defence raised by the defendant there was that "the plaintiff had contrary to law charged penal rate of interest at 19% per annum on the default instalments or overdue amount i.e. 4% per annum over and above the varied prescribed rate. As advised by her solicitors, the defendant verily believed that the plaintiff was not entitled under the charge annexure (which was the same one as produced at the trial of the present case) to charge additional interest by way of default interest or penalty interest at 19% per annum on the default instalments or the overdue amount. The answer of the plaintiff in that case was that it was entitled to charge the penalty interest at 19% and in any case the borrower had not objected to the charging of the penalty interest.

The doctrine of *res judicata* is expounded by Lord Guest in the case of *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No. 2) [1967] AC 853 at 933-934.

> The doctrine of estoppel *per rem judicatam* is reflected in two *Latin maxims*, (1) interest *rei publicae ut sit finis litium*, and (2) *nemo debet bis vexari pro una et eadem causa*. The former is public policy and the latter is private justice. The rule of estoppel by *res judicata*, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits (Spencer Bower on *Res Judicata*, p. 3).
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> As originally categorised, *res judicata* was known as "estoppel by record." But "as it is now quite immaterial whether the judicial decision is pronounced by a tribunal which is required to keep a written record of its decisions, this nomenclature has disappeared and it may be convenient to describe *res judicata* in its true and original form as "cause of action estoppel." This has long been recognised as operating as a complete bar if the necessary conditions are present. Within recent years the principle has developed so as to extend to what is now described as "issue estoppel," that is to say, where in a judicial decision between the parties some issue which was in controversy between the parties and was incidental to the main decision has been decided, then that may create an estoppel *per rem judicatam*.

Lord Guest in the same case also sets out the requirements of issue estoppel at p. 935 of the reported case:

> The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The two theories whereon the doctrine of estoppel *per rem judicatam* is commonly justified are (i) the general interest of the community in the termination of disputes and in the finality and conclusiveness of judicial decision and (ii) the right of the individual to be protected from vexatious multiplication of suits and prosecutions at the instance of an opponent whose superior wealth, resources and power may unless curbed by the estoppel weigh down judicially declared right and innocence - see *Lockyer v. Ferryman* [1877] 2 AC 519.

Now the estoppel which is alleged to have been created is that by the decision of this Court in Originating Summons No. 31-2546087 where by that action the present plaintiff had applied for an order for sale of the charged properties by public auction to satisfy the balance of the principal sum RM126,242.72 inclusive of interest and default interest as at 28 May 1987 and still continuing, the Court had held that the action was unsustainable as the plaintiff was not entitled to impose a penalty interest or default interest over and above the prescribed rate. The cause of action in this originating summons is said to be the same regardless of the fact that the plaintiff had purported to re-calculate the default interest based on the prescribed rate of interest. I agree with the proposition for the following reasons. In the first place the present action emanates from the same charge annexure and the reliefs prayed for are the same. In the second place it is important to note that as the plaintiff's cause of action in the present case rests on its relinquishment or abandoning of the penalty interest or default interest based on the rate of 19% per annum which is contrary to Clause 4 of the charge annexure which provided for an imposition of default interest at the prescribed rate of 14.5% per annum or such prescribed rate as the plaintiff could at its discretion stipulate by notice to the defendant (which in the present case could not be more than 15% per annum), the plaintiff should have at the hearing of its application made under the earlier Originating Summons No. 31-2546-87 raised the issue that even if the plaintiff were found to be wrong in charging the default interest it was prepared to abandon the charging of the default interest. Having failed to do so and instead insisting on its right to impose the default interest at 19% it is precluded from raising the issue now. Support for this proposition can be found in the text book on *Res Judicata* by Spencer-Bower & Turner 2nd Edn., at p. 161 where the author cited the following passage of the judgement of Sir James Wigram in *Henderson v. Henderson* [1843] 3 Here 100 at 114-115:

> In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

A similar approach was made in *Shoe Machinery Co. v. Cutlan* [1896] 1 Ch. 667 where Romer J said at p. 672:

> But a further point is now taken on behalf of the defendants. It is said that they are entitled in this action to retry the question of the validity of the patent because they have discovered fresh materials for impeaching it, fresh alleged anticipations, and are entitled to have the issue of validity retried on the footing of these further materials. In my opinion they are not so entitled. If they were held to be entitled, I do not see how there could be any finality of the questions in an action as between parties such as these. According to this contention the defendant might try his case piecemeal. He might raise such objections as he thought convenient, and when he was defeated he might then raise other points at this leisure, and might in that way try the case piecemeal, and, so far as I can see, extend it over as long a period as he pleased. In my opinion the defendants are not entitled to do that. When the question of the validity of a patent is brought for trial by reason of the defendant's contesting that question, he is bound to put his whole case before the Court; and if he does not do so, then it is his own fault or his misfortune.

This proposition was made clearer in *Hoystead v. Taxation Commission* [1926] AC 155 PC at pp. 165-166 where it was said:

> In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle - namely, that of setting to rest rights of litigant, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.

A similar approach has been adopted in the case of *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1965] 2 All ER 4 per Diplock LJ at p. 14. In the third place the plaintiff is not even sure as to the amounts owed by the defendant at the diverse dates mentioned in corrective affidavit and further corrective affidavit affirmed by its previous manager and current manager. What is more important is that in this originating summons it is asking for an order for sale of the said properties to satisfy the balance of the principal sum of RM148,582.84 inclusive of interest as at 31 May 1988 and still continuing. But in the corrective affidavit of Choo Boo Choo of 5 July 1989 he claimed that the outstanding amount as at 31 May 1988 was **RM144,292.33**. To make matters worse the plaintiff's current manager Loh Teng Fong said in his further corrective affidavit of 6 December 1989 that as at 31 May 1988 the total amount outstanding was **RM145,375.50**. There are therefore three sets of inconsistent figures as to how much was owed by the defendant on 31 May 1988. It is not, as suggested by the Counsel for the plaintiff, the case of the plaintiff's attempting to correct figures cited wrongly in the earlier affidavits but it is an attempt to correct the figure cited in this originating summons. Needless to say that such correction cannot be done by affidavit the plaintiff should amend its originating summons to bring in the correct amount owed by the defendant as at 31 May 1988. In the fourth place there is no dispute that the borrower had paid a total sum of RM111,267. From the evidence adduced, I can only conclude that in making the payment of that sum of money the defendant would have paid an element of default interest at the rate over and above the prescribed interest rate. Finally, although the plaintiff has through its manager produced a statement of account showing its recalculation of the default interest rate, it does not categorically show that the defendants were charged with the prescribed rate ranging from 13.5% to 15% in respect of the penalty interest it merely shows that the general interest rate was within the prescribed interest rate.

In the ultimate analysis I am fully satisfied that, not only the 'cause of action estoppel' operates as a complete bar against the present action of the plaintiff, the issue estoppel which ensued from the same issues decided earlier by the Court in Originating Summons No. 31-2546-87 also precludes the plaintiff from reagitating the issues which it is trying to bring up under the present originating summons. Furthermore I am convinced from the evidence that the defendant had been required to pay an element of default interest at the rate of 19% per annum contrary to the charge annexure in the course of its payments

amounting to RM111,267. The action of the plaintiff brought by way of this originating summons is therefore dismissed with costs. The charge may not be null and void *ab initio* but for the reasons stated above no further action can be instituted by the plaintiff to enforce the charge unless the plaintiff can show that the principal sum of RM150,000 with the prescribed normal interest has not been fully paid by the defendant. The question of penal interest and default interest can no longer be resuscitated.

Also found at [1991] 1 CLJ 576